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SUPREME COURT, U.S.

No. 82-996

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the rental purchase contract entered into by the parties, providing for the "lessee" to become the owner of a television for no additional consideration upon completion of the scheduled payments is a disguised "credit sale" within the meaning of Section 1602(g) of the Truth-In-Lending Act, 15 U.S.C. 1601 et seq.

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STATUTORY PROVISIONS INVOLVED

1. Section 102 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. 1601, provides:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strenghened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

2. Section 105 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. 1604, provides:

> (a) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

3. Section 3(b) of the Consumer Credit Protection Act, Pub. L. 94-222, Feb. 27, 1976, 90 Stat. 197, codified at 15 U.S.C. 1640 (f), provides:

> No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpetation thereof by the Board or in conformity with any interpetation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpetations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after suchact or ommission has occurred, such rule, regulation, interpetation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

STATEMENT OF THE CASE

This case involves a claim for statutory damages under the Truth in Lending Act, 15 U.S.C. §1601, and the Iowa Consumer Credit Code, Chapter 537, Code of Iowa. The Plaintiff is a consumer who entered into a contract with the Defendant under the terms of which the Plaintiff could become the owner of a RCA color T.V. set upon the payment of One Thousand Three Hundred Twenty-Six Dollars ($1,326.00) over a period of one and one-half years. The contract executed by the Plaintiff did not disicose, however, the total cost of the T.V. set, the finance charge associated with the transaction, or the annual rate of interest.

Plaintiff's action was filed in the United States District Court for the Southern District of Iowa on December 12, 1980. On April 24, 1981, the District Court issued a Ruling sustaining the Defendant's Motion to Dismiss and granting a final Judgment in favor of the Defendant. On August 13, 1982 this decision was reversed by the United States Court of Appeals for the Eighth Circuit.

The facts as alleged in the Complaint are that on or about October 13, 1979, the Plaintiff (Mr. Clark) signed a contract with the Defendant (company) under which he could own a RCA color T.V. set. The terms of the agreement were that Mr. Clark could pay weekly installments of Seventeen Dollars ($17.00) each and at the end of Seventy-Eight (78) consecutive weekly payments, the title to the T.V. set would be his (Exhibit A. of Complaint). The contract also provided that Mr. Clark could terminate it at any time by returning the property to the company and paying any installments due. Pursuant

to the agreement, Mr. Clark took possession of the T.V., used it in his family residence, and paid installments for approximately three months. (Complaint p. 2). In the latter part of January, 1980, Mr. Clark fell behind on an installment, and the company removed the T.V. set, without notice, from his residence. (Complaint p. 2). One week later, Mr. Clark again contacted the company to secure the return of his television set. (Complaint p. 2). A second contract was executed which was nearly identical to the first document and the identical T.V. set was returned to Mr. Clark. (Exhibit "B" of Complaint). Mr. Clark continued to make payments pursuant to the contract from February, 1980, to the latter part of July, 1980. (Complaint p. 2). In August, 1980, the company again repossessed the television set and thereafter refused to enter into any further transactions with Mr. Clark. (Complaint pp. 2-3). At that point, Mr. Clark had paid the company over Six Hundred Dollars ($600.00) and only had the use of the television for approximately nine (9) months (Complaint p.2).

I

THE SUPREME COURT SHOULD DENY THE PETITION FOR CERTIORARI BECAUSE THE APPELLANT-PETITIONER HAS NO REAL INTEREST IN PROSECUTING THIS CASE.

The party requesting this Court for a Writ of Certiorari is allegedly The Rent-It Corporation. In fact, the Rent-It Corporation (the appliance rental business against whom William Clark brought his claim) has had no involvement in this case since the District Court proceedings. The Rent-It Corporation made no appearance nor filed any brief before the Eighth Circuit Court of Appeals. See Opinion Below at 685 F.2d 245, 246 (8th Cir. 1982).

The Rent-It Coroporation is no longer doing business in Iowa (the site of the claim) and has lost its good standing in its state of incorporation, Missouri. See Appendix p.20 attached. Nor can The Rent-It Coropration be contacted at its former headquarters in Kansas City.

After the decision below of the Eighth Circuit Court of Appeals, this counsel was contacted by Petitioner's counsel, J. Samuel Choate, who stated he was retained by the Association of Progressive Rental Organizations (a trade association of appliance rental businesses), through its counsel, Attorney Ed Winn of Austin, Texas, to seek a reversal of the Eighth Circuit decision. Mr. Choate and Mr. Winn have informed this Counsel on at least three occasions, up to and including after the filing of the Petition for Writ of Certiorari herein, that they have had no contact with The Rent-It Corporation or its officers or stockholders. The only authorization to proceed in this matter which opposing counsel has asserted to Mr. Clark's attorney is the tacit approval of the trial counsel, Rosenberg and Margulies of Des Moines, Iowa, who themselves have told Mr. Clark's counsel that they have had no direct contact with The Rent-It Corporation since the District Court proceedings in May of 1981.

It would appear that The Rent-It Corporation is no longer a viable business, is no longer in good standing as a Corporation, and has no real interest in further pursuing this case. The Association of Progressive Rental Organizations, which has never been a party to this case, cannot assume the rights of The Rent-It Corporation to petition for a Writ of Certiorari herein, and is certainly not responsible for any judgment William Clark may eventually obtain against The Rent-It Corporation. Thus, the Association has no real case or controversy with William Clark. It's desire for the reversal of the case because of its allegedly harmful precedential value is not legally sufficient to maintain the Petition for Certiorari herein. The Petition for Certiorari should be denied.

II

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE GROUNDS ASSERTED IN SUPPORT THEREOF WERE NEITHER RAISED, CONSIDERED, NOR DECIDED IN THE COURTS BELOW.

The gravamen of Petitioner's argument for this case to be heard by the Supreme Court is that the lower courts allegedly totally ignored unofficial staff opinions of the Federal Reserve Board as well as the Supreme Court's admonition in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) to uphold the Federal Reserve Board unless "demostrably irrational." (Pet. for Cert., 7).

In fact, no Federal Reserve Board staff opinions were ever raised in the District Court or the Court of Appeals, other than in the request for Rehearing. See Opinions below at 511 F. Supp. 796 (S.D. Ia. 1981) and 685 F. 2d 245 (8th Cir. 1982) respectively.

Petitioner in the district court filed no brief in support of its Motion to Dismiss, nor cited any authority for its position in the Motion itself. In the Court of Appeals, Petitioner didn't even bother to appear or file a

brief in opposition. See 685 F.2d, at 246. The lower courts had no opportunity to review the Federal Reserve Board unofficial opinions or to compare the facts underlying those opinions to the circumstances of The Rent-It Center Corp - Clark transaction. Thus there is no justification for Petitioner's charge that the lower courts were totally ignoring Federal Reserve Board opinions.

Nor does counsel for Association of Progressive Rental Association's belated plea for a Rehearing in the name of the Petitioner justify his charge that the Court of Appeals was attempting to usurp an administrative agency's responsibility for interpreting the Truth-In-Lending Act, 15 U.S.C. 1601 et seq. There were no grounds given for the denial of a rehearing. The fact that Petitioner had failed to brief or otherwise present his new argument prior to the Request for rehearing was sufficient grounds to refuse to review his new argument for the first time on Rehearing. Likewise it is sufficient grounds for this Court to Deny a Petition for Certiorari to hear an argument never raised, considered, nor decided in the Court below.

III

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT IS PREMATURE TO DECIDE TILA COVERAGE BEFORE EVIDENCE OF THE TRUE SUBSTANCE OF THE TRANSACTION IS PRESENTED.

This case is before the Court on allegations of error in the lower court's rulings on a Motion to Dismiss. The Court of Appeals did not decide that the rental-purchase agreement herein was a credit sale under the Truth-in Lending Act, 15 U.S.C. 1601 et seq (hereinafter TILA). The appellate court decided only that Clark should be given an opportunity to prove that the agreement was a disguised credit sale contrived to evade regulation by the TILA.

> "Clark should be given an opportunity to substantiate these claims, and to establish that the 'rental agreement with option to purchase' was in fact a disguised credit sale. 685 F.2d 245, at 248.

So the applicability of TILA to this transaction between the parties remains to be decided. The appellate court was merely adhering to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, at 45-6 (1957). This rule is especially appropriate to TILA cases because it often involves claims against creditors attempting "to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish." Mourning v. Family Publications Services, Inc., 411 U.S. 356, at 365 (1973). In TILA cases, the substance, rather than the form of the transaction needs to be examined to correctly apply the law to the facts at hand.

> In interpreting the act, the federal reserve Board and the majority of courts have focused on the substance, rather than the form, of credit transactions, and have looked to the practices of the trade, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations. Joseph v. Norman's Health Club, Inc., 532 F.2d 86 at 90 (8th Cir. 1976).

See also Hickman v. Cliff Peck Chevrolet, Inc., 566 F.2d 44, 46 (8th Cir. 1976). Short of an Answer being filed and discovery had, courts have been reluctant to rule as a matter of law that rental-purchase agreements have successfully evaded TILA coverage. In Jones v. Action T.V. Rental Civil Action No. 79-1535 (E.D. Pa. June 30, 1980) reprinted in Appendix, the Court states:

> Although bona fide leases are not covered by the Truth in Lending Act, leases which are actually disguised sales agreements, designed to evade regulation, do come within the act. Green v. Arrata Leasing Corp., No. C-75-0157 (N.D. Cal., April 8, 1975). Through discovery, evidence may surface which will show that these agreements actually allow for extended credit sales. Since discovery may assist in determining the validity of plaintiff's alternative claim, the motion to dismiss on the ground that these transactions are not credit sales is denied. Id at 9. (App. p.21)

The Court in Burks v. Curtis-Mathis Centers, Inc., Civil No. 4-79-429 (D. Minn. Nov. 14, 1980)(reprinted in App.) similarly wanted to examine the substance of the transaction rather than the mere form before deciding whether the agreement was a credit sale under TILA.

> It is appropriate in this case to look beyond the form to the substance of the parties' agreement, but on the present state of the record it is impossible to determine whether the agreements were true leases or disguised sales agreements. If, as the plaintiff contends, the parties did view the agreement as a single agreement over an extended period, then the plaintiffs would have contrated to pay a 'sum substantially equivalent to or in excess of the aggregate value of the property..." and the transaction would be a credit sale. Facts that would be helpful to the court in making its determination include the percentage of customers in the 'rent to own' program that actually become owners and the operation of the contractual clause regarding the customer's responsibilities for damage. Presently, the matter is not ripe for decision. Id.

At trial William Clark will attempt to present evidence establishing the subject transaction as a credit sale under TILA, including, but not limited to, the following:

1) Clark responded to Petitioner's T.V. advertisement of a purchase plan with no down payment and no credit checks;

2) Clark intended from the outset to purchase the television;

3) Petitioner knew Clark intended to purchase the television;

4) The language of the contract is consistent with an intent to purchase;

5) Petitioner devised his business primarily to attract low-income consumers who would like to purchase televisions, but cannot obtain conventional financing;

6) Most of Petitioner's customers intend to purchase;

7) Most customers do eventually buy the television;

8) Petitioner actually performed at least minimal credit checks on potential customers;

9) Petitioner charged purchasing customers at least two to three times the retail value of the television sets;

10) Petitioner's scheme was designed to evade usury and TILA laws; and

11) Many customers would refuse to buy or, at least first shop elsewhere if they realised the actual deferred payment price.

The decision of the Court below merely prohibits the dismissal of Clark's claim because of any doubts by the trial court that he could prove all or some of the above facts necessary to Clark's claim of a disguised credit sale. See Opinion 685 F.2d, at 248. This is in accord with established precedent. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974).

The Eighth Circuit has rightly refused to let the form of a purported rental agreement (the body of whose language is in no way totally incompatible with an intention by the parties to sell the television) ride roughshod over the true nature of the contract. The issue to be decided after trial is, if all of the above facts are true, has Petitioner successfully devised a scheme to evade the disclosure protections Congress intended to provide in TILA to consumers like Mr. Clark.

IV

UNOFFICIAL STAFF OPINIONS OF THE FEDERAL RESERVE BOARD LACK THE STUDIED CONSIDERATION GIVEN OFFICIAL INTERPRETATIONS AND LETTERS BY THE BOARD AND SHOULD NOT BE GIVEN THE DEFERENCE OF THE "DEMONSTRABLY IRRATIONAL" STANDARD ENUNCIATED IN MILHOLLIN V. FORD MOTOR CREDIT COMPANY.

This Court in Milhollin v. Ford Motor Credit Company, 444 U.S. 555 (1980) held that official interpretations of the Federal Reserve Board and its staff interpreting gaps in Regulation Z were binding on the Courts unless "demonstrably irrational." Id, at 568. The Federal Reserve Board's position (upheld by the Court in Milhollin) that an acceleration clause need not be disclosed was promulgated in an official staff letter.

The procedure for issuing staff letters provides that they be published in the Federal Register (12 CFR 226.1(d)(2)(ii)(1981) subjected to public comment, be issued only by duly authorized officials (12 CFR 226.1(d)(4)(1981), and receive the benefit of other procedural safeguards.

Unofficial staff opinions (such as those relied on by Petitioner herein) were not formulated with the same safeguards or studied consideration as official interpretations. They were not reviewed by the Federal Reserve Board itself. They were not published in the Federal Register or Code of Federal Regulations. They were issued at staff members' discretion (12 CFR 226.1(d)(1)(1981), in response to a specific parochial concern of an individual creditor, who must be relied on to present all the relevant facts to the staff members. They were used in situations demanding a "rapid response" from Federal Reserve Board employees. (12 CFR 226.1(d)(1)(1981).

The Board by regulation explicitly excepts these unofficial staff opinions from being relied on for the purposes of the "good faith" defense created by 15 U.S.C. 1640(f).

> "(d) Issuance of staff interpretations.
>
> (1) Unofficial staff interpretations will be issued at the staff's discretion where the protection of section 130(f) of the Act is neither requested nor required, or where a rapid response is necessary." 12 CFR 226.1(d)(1)(1981).

The Courts have likewise held that unofficial staff opinions are no defense under 15 U.S.C. 1640(f). Jones v. Community Loan and Investment Corp, 544 F.2d 1228 (5th Cir. 1976) cert. den. 431 U.S. 934 (1977).

Courts speaking on the subject both before and after Milhollin have rejected any attempt to invoke unofficial staff opinions as authoritative interpretations of TILA or the regulations. For decisions prior to Milhollin see Basham v. Finance America Corp., 583 F.2d 918, 925 (7

Cir. 1978) Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976), Gillard v. Aetna Finance Co., 414 F. Supp. 737 (D. La. 1976). For decisions subsequent to Milhollin see Bury v. Marietta Dodge, 692 F.2d 1335, 1339-40 (11th Cir. 1982) and Davis v. Colonial Securities Corp., 541 F. Supp. 302, 305 (E.D. Pa. 1982). The Bury court perceptively stated:

> Bury is correct in stating that if we give the two letters of the staff attorneys the same weight as official staff interpretations of the Federal Reserve Board, these board letters would have the effect of overruling Whitfield v. Termplan. We cannot allow this result, because it would then follow that any attorney of the Federal Reserve Board could write a letter indicating his own private interpretation of a regulation or statutory provision, indicate in the letter that he feels his interpretation to be indicative of the Federal Reserve Board's interpretation of the statute, and thereby, automatically reverse any court's decision which holds otherwise. If we follow Bury's reasoning, a court can be controlled by staff interpretations which need not be published. A staff attorney could write a letter, keep it in his desk, and yet produce a letter which would control each court in the nation. We cannot believe that this is the result which the Supreme Court intended.
>
> As the Supreme Court said in Milhollin, the opinions of members of the Federal Reserve Board should be given considerable weight unless they are "demonstrably irrational." Milhollin, 444 U.S. at 565, 100 S.Ct. at 797. To give controlling weight to a staff letter by an attorney on the Federal Reserve Board, writing to anyone in the country as to his interpretation of statutory construction, would produce a demonstrably irrational result, and is therefore not the path which we choose to follow. We believe that the Supreme Court has dictated that we follow official staff interpretations of the Federal Reserve Board, and we do not believe the two letters appended to Bury's motion to alter judgment to be official staff interpretations. 692 F.2d at 1339-40.

Nor does the subsequent promulgation of a new definition of "credit sale" in the current Regulation Z (12 CFR 226.2(16)) cure the inadequacies of the unofficial staff opinions. There are three reasons:

1) The current Regulation Z was not even written at the time of the subject transaction in October, 1979 and on February 1, 1980 and clearly not applicable to this case;

2) The new regulation only exempts leases terminable without penalty to the debtor from the definition of credit sale, while in this case Mr. Clark was severely penalized by the loss of over $600 and a color television set; and

3) The current regulation, if interpreted as excluding Mr. Clark from the protection of the TILA is plainly wrong and demonstrably irrational.

V

THE SUBJECT RENTAL PURCHASE AGREEMENTS ARE DISGUISED CREDIT SALES, SUBJECT TO THE TILA, AND ANY FEDERAL RESERVE BOARD OPINION OR REGULATION TO THE CONTRARY IS DEMONSTRABLY IRRATIONAL.

No matter what is argued regarding the coverage by the Truth in Lending Act of rental purchase agreements, it is beyond cavil that consumers such as Mr. Clark were exactly the type of consumer Congress attempted to help with the disclosure provisions of the Act. Clark was attempting to purchase a television (not warranted to be new) worth at the most approximately $600. Although enticed by the absence of a downpayment, he was not told he would pay $1326. over a year and a half. The dollar cost of his inability to pay cash was approximately $726. As a credit sale the annual percentage rate would be so high it is beyond the highest listing in the Annual Percentage Rate Tables published by the Board (53.91% for a schedule of 78 weekly payments). Who can deny Mr. Clark and others would greatly benefit from comparison shopping to ascertain "more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601.

Petitioner would have this Court believe Congress so inartfully drafted the TILA so as to allow this one group of low income consumers to slip beyond the pale of the protection of the Act.

Congress certainly thought it had drafted a statute in TILA that was sufficiently comprehensive and flexible to encompass every lease that could terminate in vesting ownership of the property for no or nominal consideration in the lessee. The House Report on the bill adopted language covering disguised leases nearly identical to that generally prevalent in other areas of commercial law.

> The language covering disguised leases is nearly identical to the language used in the Uniform Conditional Sales Act and the many state retail installment acts to distinguish between 'true' leases and other leases.

House Report 1040, 1968 U.S. Code Cong. and Ad. News 1980. Later in enacting the Consumer Leasing Act of 1976, P.L. 94-240, 90 Stat. 257, 15 U.S.C. 1667 et seq., the Senate Report described leases with an option to purchase as already covered by the TILA.

> In its 1974 Annual Report, the Federal Reserve Board pointed out that the existing Truth in Lending Act had no application to leases (other than leases with an option to purchase at a nominal price).

> Yet the Truth in Lending Act's careful and thorough disclosure requirements do not apply to any lease unless it contains an option to purchase at no, or a nominal consideration.

> Those occasional leases which include an option to purchase at no or a nominal consideration are left subject to the Truth in Lending Act, however, on the theory that they are closer equivalents to credit sales and ought to include finance-charge and annual percentage rate disclosures. Senate Rep. 84-590, 1976 U.S. Code Cong. & Ad. News 432, 433, 434.

So-called lease purchase contracts are a convenient means for the low-income consumer to finance the purchase of consumer goods, and thus these "leases" are functionally equivalent to credit sales. See Note, The Applicability of The Federal Truth-in-Lending Act to Rental Purchase Contracts, 66 Cornell Law Rev. 118, at 125 (1980). The TILA was designed by Congress to give all consumers purchasing on credit, (no matter the written device used to formalize the purchase) the opportunity to make an informed use of credit. In fact, Congress went so far as to give the Federal Reserve Board the authority necessary "to prevent circumvention or evasion" of the TILA. 15 U.S.C. 1604.

In the case of rental purchase contracts, the Federal Reserve Board staff, instead of using the law to prevent circumvention of the TILA, as intended, has unreasonably used its regulatory power to give its imprimatur to a flagrant and harmful example of the uninformed use of credit.

The reason the Federal Reserve Board staff has adopted this unreasonable position is because they failed to examine the facts underlying the transaction. Instead they responded to written inquiries of creditors who supplied only the facts they thought relevant, the written agreement. The unofficial staff opinions cited by the Petitioner do not discuss facts tending to prove that these rental purchase contracts might be a scheme to avoid coverage of the Act. The staff does not discuss whether merchants are primarily promoting these leases as a convenient means to purchase appliances; whether most consumers entered the contracts principally to buy; whether most consumers quickly make such a heavy investment in the appliance relative to its typical retail value that it is financially prohibitive to terminate. Mr. Clark, for example, had already "invested" $238 (over one-third the retail value of a new set) into the subject television at the time of the termination of his first contract, and had no sensible financial alternative but to attempt to reinstate the contract.

The superficial handling by the Federal Reserve Board staff an ever-expanding consumer merchandising field was totally inconsistent with the time-honored analysis used by Courts and agencies in other areas of commercial law. This Court held in 1876 that

> "[i]n determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties." Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 672 (1876)

Whether a written agreement is a true lease or a sale is one of the most frequently litigated issues under the Uniform Commercial Code. See J. Whiet and R. Summers, Handbook of the Law Under the Uniform Commerical Code, 878 (2d Ed. 1980). In U.C.C. litigation other factors besides the lease agreement itself are always considered, such as the expectation of the parties, practice in the industry, and the true economic effects of the transactions. See Claxton, Lease or Security Interest: A Clasic Problem of Commercial Law, 28 Mercer L. Rev. 599 (1977).

The fact that certain "leases" have termination or open-end clauses, such as Mr. Clark's, has not prevented Courts from finding them security interests under the U.C.C. United Rental Equipment Co. v. Potts and Callahan Contracting Co., 231 Md. 552, 191 A.2d 570 (1973). A similar result was reached in the bankruptcy case of In re Royer's Bakery, 1 U.C.C. Rep. 342 (E.D.Pa. 1963).

In tax matters, Courts have traditionally looked to the parties' conduct as well as the substantive provisions of the agreement to determine whether a lease or sale is involved. Swift Dodge v. Comm., 692 F.2d 651, 652 (9th Cir. 1982); Frank Lyon Co. v. U.S., 435 U.S. 561 (1978).

The Federal Reserve Board staff's decision to relegate consumers in Mr. Clark's situation to a "let the buyer beware" position is out-of-step with its other attempts to render the TILA effective, such as in the adoption of the Four Installment rule. See Mourning v. Family Publications Service Inc., 411 U.S. 356 (1973). That rule was admittedly broad enough to cover some

merchants who did not even charge credit, but who were included under the TILA for the sake of the greater effectiveness of the enforcement of the Act. Id., at 373-4. Likewise, it is no excuse to exclude the vast majority of consumers who intend to use the rental purchase agreement to buy appliances (See Note, 66 Cornell Law Rev. 118, 137, supra) because there are some who only intend a short-term rental.

Another unreasonable basis for the Federal Reserve Board staff's position on rental purchase agreements is their equation of the words, "contracts to pay" with "obligation to pay." That is an unreasonable gloss on the statute in light of the TILA's broad remedial purpose. Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1976).

Nowhere in the definition of "credit sale" does it say that a lessee must be obligated to pay rent in an aggregate sum which equals or exceeds the value of the rented property. Under the parties' agreement, Mr. Clark had the right by contract to pay $17.00 for 78 weeks or a total of $1326, and title to the set would be transferred to him. It is true that Mr. Clark had the option of not paying the weekly fee, thereby terminating the agreement. This provision did not change the essential nature of the agreement as a contract to pay $17. for 78 weeks with the intent of owning a television. "A contract can create an 'option' that is conditional, a power to terminate on the happening of some stated future fact or event. . . . On the other hand, a contract can create an unlimited and unconditional option, a power to terminate at will." 3A Corbin on Contracts §647 at 103 (1960 ed). In any event, terminable or not, the buyer is still contracting to pay in excess of the value of the property.

Nor is it true that there is no cost or penalty to Mr. Clark for terminating the contract. The Unofficial Staff Opinions seem to rely on the lack of a penalty to the "lessee" as a principal basis for denying coverage.

> "Such termination by the lessee results in no penalty or additional cost being imposed on the lessee" Unofficial FRB letter No. 1192, June 15, 1977 5 CCH, CCG §31,623

Mr. Clark suffered severe financial damage by his loss of over $600 and his television set. Many other consumers suffer similar damage because of the rapid accumulation of their "investment," as the rental payments mount up. What seems like a low monthly or weekly payment soon locks them into a financial course lowincome consumers may be unable to maintain, much to their severe penalty, especially when they may have paid far more than the value of the appliance in a year's time. See Des Moines Tribune, August 18 1981, App. p.51).

The Federal Reserve Board staff is demonstrably unreasonable in not seeing that the status of a lessee such as Mr. Clark is practically indistinguishable in effect from that of a buyer under a conditional sales contract:

1) Both buyer and lessee must be transferred title as of right at the end of the scheduled payments;

2) The lessor and vendor both have the right to end the agreement and regain possession of the property for nonpayment of a scheduled payment;

3) In both cases all payments are applied toward the cost of acquiring the property;

4) Neither lessee nor buyer generally have the right to encumber the property or remove it from their residence;

5) The failure to make timely payments terminates the right to possession of both lessee and vendee.

6) Both lessee and buyer are responsible for the fair market value of lost, damaged, or destroyed property.

The only difference is that the buyer is liable for a deficiency in the resale of the collateral. This difference fades into near oblivion when one considers the unlikelihood of the low-income consumers (many judgment proof), to whom this rental purchase agreement is promoted, ever truly being held accountable to pay the deficiency.

The Federal Reserve Board staff is demonstrably irrational in not examining the underlying facts, practical effects, and economic realities of the rental purchase agreements, as have the Courts, such as the Eighth Circuit herein, who have recently recognized both these uninformed lessees and these disguised sales agreements

as the proper object of F.R.B. broad regulatory authority. See Davis v. Colonial Securities Corp., 541 F. Supp. 302 (E.D.Pa 1982); Waldron v. Best T.V. and Stereo Rental, Inc., 485 F. Supp 718 (D.Md. 1979); Jones v. Action T.V. Rental, Civil Action No. 79-1535 (E. D.Pa. June 30, 1980); Burks v. Curtis-Mathis Centers, Inc., Civil No. 4-79-429 (D. Minn. Nov. 14, 1980); Murphy v. McNamara, 27 U.C.C. Rep. Serv. 911 (Conn. Super. Ct. 1979); Johnson v. McNamara, Civil No. H-78-238 (D. Conn. 1979). Each of these Courts gave the consumer the right to prove rental purchase agreements to be credit sales. These Courts, like the authors of the UCC, state that whether a lease is intended as a security or a lease must be determined not by blind adherence to form but by the facts of each case. Section 1-201 (37) U.C.C. Any other conclusion is "demonstrably irrational."

CONCLUSION

Functionally equivalent to credit sales, rental purchase contracts are highly attractive sales devices for retailers anxious to derive substantial profits. Note, 66 Cornell Law Rev. 118, 130-31, supra. Using this techinque the merchant may conceal the costs of deferred payment as well as the total purchase price. Id. He reaps the benefits of credit sales without the responsibilities of the TILA.

The exclusion of rental purchase contracts creates the same problems Congress enacted the TILA to cure. Id. Such a position frustrates comparative shopping and undermines competition among financial institutions and the informed use of credit. The opinion of the Eighth Circuit Court of Appeals in this case helps to restore that competition. The decision should therefore not be reviewed.

Anthony Touschner

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William Clark
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(515) 243-1193

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing were deposited in the United States mail, postage prepaid, on the 28th day of January, 1983 addressed as follows:

J. Samuel Choate Jr.
Attorney at Law
505 First National Bank Building
801 Broad Street
Augusta, GA 30903

Anthony Touschner

I certify that a copy of the foregoing Brief was deposited in the United States mail, postage prepaid, on the 28th day of January, 1983, addressed as follows:

Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Anthony Touschner

SUBSCRIBED AND SWORN to before me this 28th day of January, 1983, by Anthony J. Touschner, Attorney for Respondent.

Phyllis A Larsen
NOTARY PUBLIC
In and for the State of Iowa

State of Missouri . . . Office of Secretary of State

JAMES C. KIRKPATRICK, Secretary of State

LEGAL AID SOCIETY OF POLK COUNTY
102 EAST GRAND AVE.
DES MOINES, IOWA 50309

ABSTRACT OF CORPORATE RECORD

Today's date is Dec. 14, 1982

Re: THE RENT-IT CORPORATION (# 200377)

The records of the Corporation Division, Office of the Secretary of State, State of Missouri, show that the above corporation:

XX Is a Missouri corporation incorporated on May 1, 1978

____ Is a _____ corporation which qualified in Missouri on _____

XX Registered Agent is John H. Schmidt

XX Registered Office is 610 Woodruff Bldg., Springfield, Missouri

____ Is in Good Standing

XX Filed its most recent Annual Report listing officers & directors in 19 80
(Copy Attached)

XX Is not in Good Standing because charter was forfeited January 1, 19 82 for
XX Failure to file the annual registration report
____ Failure to pay corporate franchise taxes
____ Failure to file the foreign corporation affidavit
____ Fraud
____ Failure to maintain a registered agent and office

____ The corporation is no longer in existence because articles of dissolution and liquidation were filed, and a certificate of dissolution was issued on _____

____ Other Data:

James C. Kirkpatrick

JAMES C. KIRKPATRICK
Secretary of State

SS

26,985
10 p.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FOR LEGAL SERVICES

ERNESTINE JONES AND HARRY JACKSON AND MAE JACKSON on behalf of themselves and all others similarly situated	:	CIVIL ACTION
vs.	:	FILED JUN 30 1980
ACTION TV RENTAL, INC.	:	NO. 79-1535

MEMORANDUM & ORDER

GREEN, J. JUNE 30, 1980

The named plaintiffs in this action seek to represent a class consisting of all customers who have entered into, or will enter into transactions to lease televisions from the defendant, Action TV Rental, Inc. The plaintiffs allege the following facts. They saw advertisements offering the opportunity to obtain their own television for a small downpayment. In response to these advertisements, they contacted the defendant by phone. Over the phone, the plaintiffs were informed of the weekly or monthly payment required, and the amount of the downpayment. An agent of the defendant then came to the plaintiffs' houses with the result that they signed rental agreements.

The document signed by the plaintiffs is headed, "This is a Rental Agreement with Option to Purchase." The terms of the agreement include the weekly or monthly payments due and the delivery fee. The lease is renewable by paying the weekly or monthly fee in advance. If the lease is continued for a stated period of time and payment provisions are complied with the title to the property is to be transferred to the renter. The agreement provides, however, "Renter is required to rent the equipment for only one week [month]."

Seeking both monetary and injunctive relief, the plaintiffs instituted this action which contends that the defendant's lease arrangements violate various provisions of the federal Truth-in-Lending Act, 15 U.S.C. §§1601, et seq.

Regulation "Z", 12 C.F.R. §226, and the Federal Trade Commission (hereinafter "FTC") "Door-to-Door Sales Rule," 16 C.F.R. §429.1, and state law governing door-to-door sales. Subject matter jurisdiction over the action is alleged pursuant to the provisions of 28 U.S.C. §1337, 15 U.S.C. §§1640(e) and 1667d, and the doctrine of pendent jurisdiction.

The defendant responded to the amended complaint by filing the motion to dismiss now before the Court. The defendant advances a series of arguments for dismissal. First, defendant contends that the Truth-in-Lending Act does not apply to these transactions because the rental agreement is neither a "consumer lease" as defined in 15 U.S.C. §1667 nor a "credit sale" as defined in 15 U.S.C. §1602(g); thus, it is argued, the plaintiffs have failed to state a claim upon which relief may be granted. Defendants next argue that the facts alleged by the plaintiffs do not bring this transaction within the ambit of the FTC Door-to-Door Sales Rule. Further, defendant contends that dismissal of the claims based on the FTC Rule and the Truth-in-Lending Act removes the Court's basis for pendent jurisdiction over the state claims. Finally, defendant argues that this suit should be dismissed because the plaintiffs are not eligible for representation by Community Legal Services, Inc. and the claim is not within the statutory authorization of Community Legal Services. For the reasons stated below, the motion to dismiss is denied.

1. Representation by CLS

At the outset, we can dispatch with defendant's last argument. The plaintiffs contend, and we agree, that the issue of plaintiffs' representation by Community Legal Services, Inc. (CLS) is not an appropriate matter for consideration by the Court. We note that no facts disclosing

ineligibility appear on the face of the amended complaint. For this reason alone, the motion should not be granted. We need not rely on this pleading ground, however, since a provision of the statute setting up the Legal Services Corporation clearly states:

> No question of whether representation is authorized under this title or the rules, regulations or guidelines promulgated pursuant to this title, shall be considered in, or affect the final disposition of, any proceeding in which a person is represented by a recipient or an employee of a recipient.

42 U.S.C. §2996e(b)(1)(B). Since plaintiffs in this action are represented by CLS, a recipient of the Legal Services Corporation, the provision quoted above precludes any consideration of their representation in disposing of the instant motion.

2. FTC Door-to-Door Sales Rule Claim

The FTC Door-to-Door Sales Rule, codified at 16 C.F.R. §§429.1, et seq., requires a "cooling off period", along with the inclusion of certain specific items on a sales receipt, for any door-to-door sale. A "door-to-door sale" is defined as:

> A sale, lease or rental of consumer goods, or services with a purchase price of $25 or more. . ., in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller.

16 C.F.R. §429.1, Note 1(a). Defendant contends that its transactions with the plaintiffs are not within the scope of this Rule for two reasons: first, there was no personal solicitation and second, the buyer agreed to the lease over the phone and not at a place other than defendant's "place of business."

Among other exemptions, the Rule specifically excludes from the definition of "door-to-door sale", any transaction:

> (4) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services;

Defendant does not argue, however, that these transactions fall within this exception. Instead, it argues, in essence, that its business practices are not the type of conduct that the Rule was intended to regulate.

Plaintiffs, on the other hand, allege that agreement was not reached until the defendant's representative came to their homes and explained all the terms of the transaction. Pursuant to Fed. R. Civ. P. 12(b)(6), a motion to dismiss for failure to state a claim should not be granted unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Cramer v. General Telephone & Electronics Corp., 582 F.2d 259, 272 (3d Cir. 1978) (quoting Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102 (1957)). In this case, the plaintiffs have pleaded facts which bring the transactions within the scope of the Door-to-Door Sales Rule. Therefore, the motion to dismiss on this ground is denied.

3. The Truth-in-Lending Act Claim

The Truth-in-Lending Act, 15 U.S.C. §1601 et seq. was enacted to remedy the problems that resulted from a rapid expansion in the use of consumer credit. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 364 93 S.Ct. 1652, 1658 (1973). When a transaction falls within the purview of the Act, full disclosure of the credit terms is required, so that / customers can compare credit arrangements and make informed purchase decisions. Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3d Cir. 1975). Since the Act is remedial in nature, it must be construed broadly. Id.

The plaintiffs contend that the rental agreement used by Action TV Rental, Inc. is a "consumer lease" as defined

in 15 U.S.C. §1667(1). Alternatively, plaintiffs contend that the agreement constitutes a "credit sale" as defined in 15 U.S.C. §1602(g). These definitions provide:

> (1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for a personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.
>
> (g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

Strictly construing these provisions, the defendant argues that this action should be dismissed because the rental agreement does not fit within the definitions of either a consumer lease or a credit sale. Since the rental terms specified in the agreements are one week or one month, with right to renew, defendant argues that these are not "lease[s] . . . for a period of time exceeding four months. . .," and therefore do not come within the Truth-in-Lending Act. The defendant further contends that these agreements are not credit sales, as defined in the Act, because the plaintiffs did not "contract to pay as compensation. . . a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved . . . ." Instead, defendant argues that plaintiffs' only obligation was to pay the weekly or monthly rental fee or return the television set. Both of the parties have cited numerous cases, as well as interpretations of the Act by the staff of the Federal Reserve Board (FRB), in support of their respective arguments.

A. The Consumer Lease Provision

The defendant argues that Action TV Rental's lease arrangements with the plaintiffs are not "consumer leases" because they did not obligate the renter for a term exceeding four months. The defendant relies on an interpretive letter issued by the Federal Reserve Board, FRB letter No. 1169 of March 28, 1977 reported at CCH Consumer Credit Guide ¶31,566, which states:

> It is the staff's opinion that none of the[se] contracts . . . is a "consumer lease" under the Consumer Leasing Act. . . . The Act and regulation clearly provide, . . . that a "consumer lease" is a "contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months." Thus, a lease of personal property for four months, three months or on a month-to-month basis (even though the lease extends beyond four months) is not a consumer lease within the meaning of the Act . . . provided that a term of four months or less is not employed by the lessor for the purpose of circumvention or evasion of the statutory . . . requirements.

Pointing to the provision at the end of the portion quoted above, the plaintiffs argue that they should have an opportunity to learn, through discovery and trial, the "true nature" of the defendant's business practices.

Courts have been sensitive to the possibility that creditors might attempt to circumvent the provisions of the Truth-in-Lending Act. In Mourning v. Family Publications Service, Inc., supra, the Supreme Court observed:

> The language employed [in the Act] evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish.

411 U.S. at 365, 93 S.Ct. at 1658. Mindful of this sensitivity, and the remedial purposes of the Act, we find that dismissal is inappropriate at this time. Upon completion of discovery, the plaintiffs may be able to prove that the defendant used its rental agreement to attempt to evade

The Truth-in-Lending Act. These transactions would then fall within the definition of "consumer lease", and be subject to the requirements of the Act. Plaintiffs should have the opportunity to complete discovery and gather evidence showing that they are entitled to relief. See, Hooker v. Sight and Sound of Michigan, Inc., No. 79-1335 (E.D. Mich. Feb. 15, 1980). Therefore, we deny the motion to dismiss on this basis.

B. The Credit Sale Provision

The defendant argues that Action TV's rental agreements do not fall within the definition of "credit sale", supra, because the plaintiffs did not "contract to pay" a sum substantially equivalent to or in excess of the aggregate value of the property. The defendant relies on FRB letter No. 1192, of June 15, 1977, reprinted at CCH Consumer Credit Guide ¶31,623, which states:

> [A] lease will be considered a "credit sale" only if it meets both of the following criteria. First, the lessee must be contractually obligated to pay, as compensation for use of the property or services leased, a sum substantially equivalent to or in excess of the aggregate value of the property or services involved. Secondly, it must be contractually agreed that the lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property. . . .
>
> It is the staff's opinion that the lease agreement in question does not fall within the definition of a "credit sale" because it does not meet the first requirement. . . We note that the lease agreement contains an express provision permitting termination of the lease agreement at anytime, by either party . . . Such termination by the lessee results in no penalty or additional cost being imposed on the lessee. Therefore, the lessee under the lease agreement discussed above has not contracted "to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved."

In response to this argument, the plaintiffs contend that we must distinguish leases from "disguised credit sales". Plaintiffs further argue that FRB letters must be read in the light of prior commercial law in the area, specifically section 1-201(37) of the Uniform Commercial Code (UCC). The language referring to "lease" in the section of the Truth-in-Lending Act defining "credit sale," §1602(g), was taken from the UCC definition of "security interest" found in §1-201(37), and accompanying commentary. 1/ Relying on cases that have interpreted this UCC provision, plaintiffs argue that the instant transactions are "sales" within §1-201(37) of the UCC, because the plaintiffs acquired an equity interest in the televisions when their payments were credited toward the purchase price. See, e.g., In re Rover's Bakery, 1 UCC Rptg. Serv. 342, 345-46 (E.D. Pa. 1963). Therefore, plaintiffs argue that these transactions should fall within the coverage of the Truth-in-Lending Act. Plaintiffs also argue that the purchase option, in effect, forced the renter to choose between paying the entire sum or forfeiting all equity in the television.

As with the claims based on the "consumer lease" provisions, we find that dismissal of the alternative claim based on the "credit sale" provision is inappropriate at this time. Although bona fide leases are not covered by the Truth-in-Lending Act, leases which are actually disguised sales agreements, designed to evade regulation, do come within the Act. Green v. Arata Leasing Corp., No. C-75-0157 (N.D. Cal., Apr. 8, 1975). Through discovery, evidence may

1/ Warren and Larmore, Truth In Lending: Problems of Coverage, 24 Stan. L. Rev., 791, 804-05 (1972). These authors suggest, "It is doubtful that a court would allow Truth-in-Lending to be avoided by the simple stratagem of transforming an option to purchase for a nominal price into an option to renew at a nominal rental for the useful life of the property." Id. at 806.

surface which will show that these agreements actually allow for extended credit sales. Since discovery may assist in determining the validity of plaintiffs alternative claim, the motion to dismiss on the ground that these transactions are not credit sales is denied.

For all of the foregoing reasons, we enter the attached order denying defendant's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTINE JONES AND HARRY JACKSON AND MAE JACKSON on behalf of themselves and all others similarly situated	:	CIVIL ACTION
vs.	:	
ACTION TV RENTAL, INC.	:	NO. 79-1535

ORDER

AND NOW, this 30th day of June, 1980, upon consideration of the motion to dismiss and memorandum in support thereof, as well as plaintiffs' opposition thereto, IT IS ORDERED that the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, J.

ENTERED: 6/30/80

CLERK OF COURT

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DONNA JEAN BURKS,

Plaintiff,

v.

CURTIS MATHES CENTERS, INC.,

Defendant.

Civil No. 4-79-429

MEMORANDUM OPINION AND ORDER

LODA RHINES,

Plaintiff,

v.

CURTIS MATHES CENTERS, INC.,

Defendant.

Civil No. 4-79-574

JEREMY LANE, Esq., Legal Aid Society, Minneapolis, Minnesota, appeared for plaintiffs.

BRUCE E. HANSON, Esq., Doherty, Rumble & Butler, St. Paul, Minnesota, appeared for defendant.

These are actions for money damages stemming out of agreements between the plaintiffs, Donna Jean Burks and Loda Rhines, and the defendant, Curtis Mathes Centers, Inc., a foreign corporation licensed to do business in Minnesota. The plaintiffs each allege that the defendant violated the Truth in Lending Act, 15 U.S.C. § 1501, et seq., and Federal Reserve Regulation Z, 12 C.F.R. § 226, in regard to their respective agreements. Jurisdiction is asserted under Section 130(e) of the Truth in Lending Act, 15 U.S.C. § 1604(e), and 28 U.S.C. § 1337. The defendant has moved to dismiss the actions for failure to state a claim.

Background

The defendant advertised a plan whereby customers could "rent to own" televisions. The advertisement stated that there were "no credit hassles," "no long term obligation," and that "all payments apply toward ownership." The plaintiffs responded to the

advertisement. In September, 1978, plaintiff Burks and defendant entered into a written agreement whereby plaintiff Burks rented a television on a week to week basis. In November, 1978, plaintiff Rhines and defendant entered into an agreement using the same form contract that was used for the agreement with plaintiff Burks.[1]

At the top of the form agreement in bold face type are the words "THIS IS A RENTAL AGREEMENT ONLY." Other terms of the agreement provide that (1) title remains at all times with the owner, (2) renter may terminate the agreement by return of the television to the owner, (3) renter is fully responsible for loss, theft, or destruction of the television, (4) owner may terminate the agreement upon failure of the renter to make payment when due or other breach, and (5) in the event renter renews the agreement for 77 or 78[2] successive one-week terms, renter becomes the owner.

Plaintiff Burks claims that the defendant violated the Truth in Lending Act when it failed to disclose that by making payments for 78 weeks, plaintiff would be paying almost 200 percent of the retail price of the television and finance charges at an annual rate of 90.689 percent. Plaintiff Rhines claims that the defendant violated the Truth in Lending Act when it failed to disclose that by making payments for 18 months, she would be paying approximately 150 percent of the retail price and finance charges at an annual rate of over 50 percent.

The defendant admits that such disclosures were not made but asserts that there were no violations of the Truth in Lending Act because the disclosures required by the Act do not apply to the transactions between the plaintiffs and defendant. Defendant maintains that disclosures are required only for consumer credit sales and that because the agreements between the parties here were merely for rental of televisions, and therefore leases rather than sales, no disclosures were required.

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[1]Although it is not clear, it appears that the agreement between plaintiff Rhines and defendant was on a monthly basis.

[2]The contract with plaintiff Burks provided for 77 weeks; the contract with plaintiff Rhines provided for 78 weeks.

Definition of Credit Sale

The Truth in Lending Act, 15 U.S.C. § 1601, et seq., and Federal Reserve Regulation Z, 12 C.F.R. § 226, require disclosure of finance charges in a credit sale. The crucial issue presented by the defendant's motions to dismiss is whether these transactions were credit sales within the meaning of the Act. If the transactions were credit sales, the court would have subject matter jurisdiction under Section 130(e) of the Truth in Lending Act, 15 U.S.C. § 1640(e),[3] and the motion to dismiss for failure to state a claim within the jurisdiction of the court must be denied. If the transactions were not credit sales, the Truth in Lending Act and Regulation Z do not apply, and the motion to dismiss must be granted.

Credit sale is defined in Section 103(g) of the Act:

> (g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

15 U.S.C. § 1602(g).

The staff of the Federal Reserve Board has interpreted this definition in several opinion letters which conclude that rental agreements terminable at any time by the consumer are not credit sales and thus not included in the Truth in Lending Act. See FRB Letter No. 750, CCH Consumer Credit Guide ¶ 31,069; FRB Letter No. 761, CCH Consumer Credit Guide ¶ 31,083; FRB Letter No. 1192, CCH Consumer Credit Guide ¶ 31,623. The authors of the

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[3] This provision states that any action under Section 130 of the Act, 15 U.S.C. § 1640, for failure to make disclosures may be brought in any United States District Court.

opinion letters reason that if the consumer can terminate the agreement at any time, the consumer has not "contract(ed) to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved . . . ." and the transaction cannot be a credit sale. Such interpretations by an agency, although entitled to deference, are not binding on a court. Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979); Griffith v. Superior Ford, 577 F.2d 455 (8th Cir. 1979).

Several courts have reached the same conclusion as that expressed in the staff opinion letters. See Smith v. ABC Rental Systems, No. 77-2733 (E.D. La. Aug. 11, 1978), aff'd, No. 78-3180 (5th Cir. June 5, 1980); Josephine Dorsey v. Curtis-Mathes Sales Company and Curtis-Mathes Centers, Inc., Civil No. 4-79-436 (D. Minn. Mar. 23, 1979); In re Colleen R. Turner, Bankruptcy No. 3-78-1135(D) (D. Minn. Mar. 19, 1979); Clark v. Aquarius TV Rental, Inc., No. CA 4-77-133 (N.D. Tex. Oct. 18, 1977); Boyd v. ABC Rental Systems, No. C-74-456-1(B) (W.D. Ky. Sept. 12, 1975).

Other courts, however, have refused to follow the conclusion of the FRB staff opinion letters and have held that transactions similar to the ones here are credit sales and thus within the Truth in Lending Act. In Johnson v. McNamara, Civil No. 11-78-328 (D. Conn. Apr. 12, 1979), the contract provided that the consumer would become the owner of the property upon making 104 consecutive payments. The court found that it was not dispositive that the consumer was not contractually obligated to make all 104 payments and held that the Truth in Lending Act applied: "For all practical purposes the 'rental relationship' established by this form contract is indistinguishable from a credit sale." Id. See also Jones v. Action TV Rental, Civil No. 79-1535 (E.D. Pa. June 30, 1980); Dodson v. Ramco Enterprises, Inc., Civil No. 79-1132-N (E.D. Va. Apr. 9, 1980); Waldron v. Best TV Stereo Rentals, Inc., Civil No. T-79-1105 (D. Md. Dec. 28, 1979).

The House Report accompanying the Truth in Lending Act stated that "the definition of credit sales is . . . limited to include leases only if they are, in essence, disguised sale arrangements." 1968 U.S. Code Cong. Adm. News 1980. In interpreting the Truth in Lending Act in a different situation, the Eighth Circuit noted with approval that "the majority of courts have focused on the substance, rather than the form of credit transactions, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations." Joseph v. Norman's Health Club, Inc., 532 F.2d 85, 90 (8th Cir. 1976).

It is appropriate in this case to look beyond the form to the substance of the parties' agreements, but on the present state of the record it is impossible to determine whether the agreements were true leases or disguised sales arrangements. If, as the plaintiffs contend, the parties did view the agreement as a single agreement over an extended period (78 weeks for plaintiff Burks, 18 months for plaintiff Rhines), then the plaintiffs would have contracted to pay a "sum substantially equivalent to or in excess of the aggregate value of the property . . . ." and the transaction would be a credit sale. Facts that would be helpful to the court in making its determination include the percentage of customers in the "rent to own" program that actually become owners and the operation of the contractual clause regarding the customer's responsibilities for damage. Presently the matter is not ripe for decision.

The court having considered matters outside of the pleadings and finding that genuine issues of material fact exist and that defendants are not entitled at this time to summary judgment as a matter of law, defendant's motions must be denied.

ORDER

Accordingly, based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that defendant's motions to dismiss are denied.

Dated: November 18, 1980.

Diana E. Murphy
DIANA E. MURPHY
United States District Judge

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U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALBERTA JOHNSON	:	
-vs-	:	Civil No. H-78-238
BRIAN McNAMARA, d/b/a TURNPIKE TELEVISION	:	
ROSE JOHNSON	:	
-vs-	:	Civil No. H-78-498
BRIAN McNAMARA, d/b/a TURNPIKE TELEVISION	:	

RULING ON MOTIONS FOR
SUMMARY JUDGMENT AND TO DISMISS

Both of these cases arise under Connecticut's Truth in Lending Act, Conn. Gen. Stat. § 36-393 et seq., and the federal Truth in Lending Act, 15 U.S.C. § 1667. The plaintiffs, who entered into separate contracts with the defendant for the rental of personal property for household use, move for summary judgment, arguing that the rental agreements executed by them are in fact disguised conditional sales and therefore the defendant should have made the disclosures required by the Truth in Lending Act. The defendant, on the other hand, moves to dismiss on the ground that the agreements are in fact true leases, and not subject to the Truth in Lending Act.

The legal relationship established by these rental contracts is precisely the same as if words of conditional sale had been used. Basically, the agreements permitted the lessees to purchase the property by paying rent over a two year period. The only possible distinction between this and a conditional sale is that under a rental agreement the lessees would not be liable for a deficiency judgment if they ceased paying rent. However, as will be discussed below, the Connecticut Retail Installment Sales Financing Act would prohibit a deficiency judgment in the circumstances present here, even if the contracts had been labelled conditional sales. The Court therefore finds that the rental agreements are indistinguishable from conditional sales contracts, and that they are therefore subject to the Truth in Lending Act. Consequently, the defendant's motions to dismiss the Truth in Lending Act counts are denied.

At trial the defendant may be able to establish that his failure to comply with the provisions of the Truth in Lending Act was the result of good faith reliance on the unofficial staff interpretations of the Act. Whether he has such a defense is a question of fact, which cannot be resolved on the present record; the plaintiffs' motions for summary judgment are accordingly denied. Since the transactions are subject to the Truth in Lending Act and because

the Truth in Lending and Truth in Leasing Acts are mutually exclusive, the defendant's motions to dismiss the Truth in Leasing Act counts of the two complaints are granted.

Jurisdiction

Due to the peculiarities of the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., this Court has subject matter jurisdiction over Truth in Lending counts, despite the fact that they involve only issues of state law. See Ives v. W. T. Grant Co., 522 F.2d 749, 756 (2d Cir. 1975); Solevo v. Aldens, Inc., 395 F.Supp. 861, 862 (D. Conn. 1975). Whether the state or federal act is applicable is of little consequence, in light of the state regulation providing that the state's act should be interpreted as synonomous with the federal Truth in Lending Act. Connecticut Banking Department Regulation § 36-395-11. Subject matter jurisdiction over the Truth in Leasing counts is expressly provided for in 15 U.S.C. § 1667d.

Statement of Facts

The two rental agreements at issue are identical form contracts prepared by the defendant, Brian McNamara, d/b/a Turnpike Television. On September 24, 1977 the plaintiff Rose Johnson executed a contract for the rental of a stereophonic

radio phonograph, at a weekly rental of $10.69. The plaintiff Alberta Johnson signed an agreement for the rental of a color television set on May 13, 1977, for a weekly rate of $14.97. With the exception of the items leased and the weekly rates, the contracts are identical. They provide that "The renter receives use and possession of the property for successive one-week terms so long as weekly rental payments are made." The contract may be terminated at any time by the renter, by returning the rented item to the owner and paying any accrued rent. The owner may terminate the lease and repossess the property, if the renter fails to make a scheduled weekly payment. The contract provides that the renter will become the owner of the property upon making 104 successive weekly payments. For all practical purposes, therefore, the "rental" relationship established by this form contract is indistinguishable from a credit sale, in which the creditor has agreed to sell the item to the debtor, the purchase price being payable over a two year period.

Discussion of the Law

The sole issue raised by the present motions is whether the transactions come within the Truth in Lending Act's definition of "credit sale;" if they do not, the defendant is

not required to make the Truth in Lending disclosures. That definition, which is identical to the federal Truth in Lending provision, 15 U.S.C. § 1602(g), is contained in Conn. Gen. Stat. § 36-393(f):

> "(f) 'Credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract;"

The defendant has not contested the plaintiffs' assertion that the total amount to be paid over the two year period — $1,111.94 for the stereo and $1,556.88 for the television — was substantially equivalent to or in excess of the aggregate value of the property involved; and it is apparent from the terms of the contracts that the plaintiffs would become the owners of the property upon making the 104 weekly payments. The defendant argues, however, that because the contracts are terminable at will, by the plaintiffs, the latter have not contracted to pay as compensation for use a sum substantially equivalent to the value of the property involved. Therefore, the defendant concludes, the contracts do not come within the purview of § 36-393(f).

There is a paucity of authority on this issue. The defendant has not cited, nor has the Court located, any Circuit Court decisions on this issue. In support of his position the defendant cites five unpublished District Court decisions. Griggs v. East TV & Rental, Inc., No. C75-2509A (N.D. Ga. April 8, 1976); Terrell v. Mr. T's Rental, No. C75-2053A (N.D. Ga. June 4, 1976); Boyd v. ABC Rental Systems, No. C-74-456-L(B) (W.D. Ky. September 12, 1975); Clark v. Aquarius TV Rental, Inc., No. CA 4-77-133 (N.D. Tex. October 18, 1977); Smith v. ABC Rental Systems, No. 77-2733D (E.D. La. August 11, 1978). Each of these cases is factually indistinguishable from the present one, involving rental transactions which were terminable at the option of the lessee. In each case the court held that the transaction was not a credit sale, because the lessee had contracted to pay only the initial weekly or monthly payment and was therefore not obligated by the contract to pay a sum substantially equivalent to the value of the leased property.

However, in none of these five cases did the court undertake an analysis of the practical consequences of entering such a terminable lease. Rather these cases merely rely on several unofficial staff interpretation letters of the Federal Reserve Board, all holding that a lease terminable at the option of the lessee is not a credit sale, in spite of the fact that the lessee will become the owner of the

property upon making all rental payments. FRB Letter No. 750, CCH Consumer Credit Guide, ¶ 31,069 (Jan. 11, 1974); FRB Letter No. 761, CCH Consumer Credit Guide, ¶ 31,083 (March 12, 1974); FRB Letter No. 1192, CCH Consumer Credit Guide, ¶ 31, 623 (June 15, 1977).

It is axiomatic that administrative "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." United States v. Larionoff, 431 U.S. 864, 873 (1977). In terms of persuasiveness, unofficial staff interpretations stand at the bottom of the hierarchy of administrative rulings interpreting the Federal Truth in Lending Act, behind both official staff interpretations and interpretations of the Federal Reserve Board itself. Unofficial staff interpretations, which are relied on by the present defendant and by the cases he cites, are therefore not binding on this Court. See Grubb v. Oliver Enterprises, Inc., 358 F.Supp. 970, 973 n.6 (N.D. Ga. 1972).

The legislative history of 15 U.S.C. §1602(g) indicates that in defining credit sale, Congress intended to include those leases which "are, in essence, disguised sale arrangements." 1968 U.S. Code, Cong. & Admin. News 1962, 1980. In drawing the distinction between disguised sales and true leases, courts are to look to precedents in the commercial

law field:

> "The language covering disguised leases is nearly identical to the language used in the Uniform Conditional Sales Act and in many State retail installment sales acts to distinguish between 'true' leases and other leases." Senate Report No. 392, 90th Cong., 1st Sess., at p. 12-13 (June 29, 1967).

Connecticut law, which governs the instant transaction, has long held that it is the effect of the transaction, not the words employed, which determines the relationship between the parties. Thus, where it is apparent from the terms of the contract that the parties in fact contemplated a conditional sale, the Court will treat the transaction as such, even though the contract is labelled a "lease" and the installment payments are denominated "rent." Loomis v. Brace, 50 Conn. 228, 230 (1882); Hine v. Roberts, 48 Conn. 267, 270 (1880); Tishman Equipment Leasing, Inc. v. Levin, 152 Conn. 23, 28 (1964). In other words the Court "must ascertain the intention of the parties by looking at the effect of the terms of the agreement on the parties instead of by the convenient name the parties may have given to the agreement." Alban Tractor Co. v. State Tax Commission, 150 A.2d 456,459 (Md. 1959). See also Beckwith Machinery Co. v. Matthews, 57 A.2d 796, 801 (Md. 1948).

The clearest indication that a purported lease is in fact a conditional sale is a provision, like the one contained in the present defendant's form contract, that the

lessee will become the owner of the property upon making all the rental payments. As the commentary to § 1 of the Uniform Conditional Sales Act notes:

...

> "If the transaction were really a lease or bailment, naturally payments would give the so-called lessee no rights except to the use of the article, and he would be expected to return it to the lessor at the end of the lease instead of becoming automatically the owner thereof." Vol. 2A Uniform Laws Annotated at p. 22.

Similarly, in Loomis v. Brass, supra, the Connecticut Supreme Court held that "the fact that the piano was by contract to be the [lessee's] when the [full rent] should be paid, shows decisively that the monthly sums were to be paid, not as rent, but as the purchase price." 30 Conn. at 231. Accord Tishman Equipment Leasing, Inc. v. Levin, supra, 152 Conn. at 28; In re Herold Radio & Electronics Corp., 327 F.2d 564, 565 (2d Cir. 1964); In re Crown Cartridge Corp., 220 F.Supp. 914, 916 (S.D. N.Y. 1962); Park & Lacy Co. v. White River Lumber Co., 35 P. 442, 443 (Cal. 1894).

The fact that the present plaintiffs were not contractually obligated to make all 104 rental payments is not dispositive. A one month lease which could be renewed each month and which gave the lessee the option to purchase at any time, with the monthly rentals to be credited toward the purchase price, was held to be a conditional sale in Harry B. Loeb Piano Co. v. Kessler, 140 So. 398, 399 (La. 1932). Cases

construing the Uniform Commercial Code's definition of "security interest," which superseded the Uniform Conditional Sales Act, are also instructive. Where the lessee will take title to the property upon making all rental payments, the transaction is treated as a security interest. In the Matter of Oak Manufacturing Inc., CCH Consumer Credit Guide, Transfer Binder, ¶ 99,863. Thus where the contract permitted the lessee to cancel the lease after the first monthly payment, the court held that the lease was to be regarded as "a security instrument (conditional contract of sale)," because the lessee had an option to purchase and the rentals would be credited toward the purchase price. United Rental Equipment Co. v. Potts and Callahan Contracting Co., Inc., 231 Md. 552, 191 A.2d 570, 574 (1963). Other cases where a terminable lease was held to create a security interest include In re Rover's Bakery, Inc., 1 UCC Rep.Serv. 342 (E.D. Pa. 1963) and In re Dennis Mitchell Industries, Inc., 4 UCC Rep. Serv. 1082 (E.D. Pa. 1967).

An examination of the effect which these two rental agreements had on the relationship between the parties demonstrates that the leases cannot be distinguished from conditional sales. Because the plaintiffs have the option to become owners of the leased property by making 104 rental payments, the only conceivable difference between these transactions and the traditional conditional sales arrangement is

that under the rental contracts the plaintiffs could cancel their agreements without being subject to a deficiency judgment. However, the Connecticut Retail Installment Sales Financing Act would prohibit the collection of deficiency judgments in cases like the present ones. Conn. Gen. Stat. § 42-98(f). Therefore, the legal obligations between the parties under the present contracts are precisely the same as they would have been if the plaintiffs had unequivocally agreed to purchase the property and pay the purchase price in weekly installments over a two year period. Given this circumstance, a holding that these contracts are not subject to the Truth in Lending Act because they are phrased in terms of a lease rather than in terms of a conditional sale would represent a supreme exaltation of form over substance. The Court therefore holds that the present contracts constitute "credit sales" within the meaning of Conn. Gen. Stat. § 36-393(f), and denies the defendant's motions to dismiss the Truth in Lending counts.[2/]

This conclusion does not dictate the granting of a summary judgment in the plaintiffs' favor, however. Although it has not been raised by the defendant, he may have a defense to civil liability based upon 15 U.S.C. § 1640(f). That section provides:

> "(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in

> conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason."

Prior to the 1976 amendment, a good faith reliance on the unofficial staff interpretation letters would not have provided a defense to civil liability. See Ives v. W. T. Grant Co., 522 F.2d 749, 758 (2d Cir. 1975). However, with the 1976 amendment to the Truth in Lending Act the defendant can avoid liability by proving that its failure to make the required Truth in Lending disclosures was the result of good faith reliance on the aforementioned unofficial staff interpretations, even though the Court has ruled here, that those interpretations are not an accurate reading of the Act in the circumstances present here. 2/ Charles v. Krauss Co., Ltd., 572 F.2d 544,549 n.4 (5th Cir. 1978). Whether the defendant did in fact raly on those staff interpretations is a question of fact, which cannot be resolved on a motion for summary judgment. Jones v. Community Loan & Inv. Corp., 544 F.2d 1228, 1232 (5th Cir. 1976), cert. den. 431 U.S. 934 (1977). Accordingly, the plaintiffs' motions for summary judgment are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 12th day of April, 1979.

T. Emmet Clarie
Chief Judge

FOOTNOTES

1/ That statute provides:

> "(f) Deficiency on resale. Notwithstanding that the proceeds of the resale are not sufficient to defray the actual and reasonable expenses thereof, and also such actual and reasonable expenses of any retaking and storing of such goods and the balance due under the contract, the holder of the contract may not recover the deficiency from the retail buyer or any surety or guarantor for him, or from any one who has succeeded to the obligations of such retail buyer, except as provided in subsection (g) of this section."

2/ This conclusion requires that the Court dismiss the Truth in Leasing counts. The Truth in Leasing Act expressly excludes from its coverage "any credit sale as defined in section 1602(g) of this title." 15 U.S.C. § 1667(1). Because the Court has ruled that the present transactions are credit sales within the meaning of the Truth in Lending Act, the Truth in Leasing Act is by its express terms inapplicable.

3/ Crucial to the Court's holding that the present contracts are subject to the Truth in Lending Act is the fact that Connecticut law would prohibit a deficiency judgment in the circumstances present here, even if the agreements were phrased in terms of conditional sale. The Court therefore has no need to rule on the question of whether the unofficial staff interpretations reflect an accurate reading of the Truth in Lending Act in a jurisdiction where such a deficiency judgment may be assessed against the defaulting conditional buyer. Similarly, the Court has no occasion to rule on whether the present ruling would apply to an automobile lease, given the fact that Connecticut permits the conditional seller of an automobile to recoup a deficiency judgment in certain circumstances. See Conn. Gen. Stat. § 42-98(g).

Des Moines, Iowa, Saturday, August 15, 1981 — One Section

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Rental TVs: Costly 'rip-off' or needed service?

By Susan Caba

Some Des Moines residents — many of them poor — are buying television sets on easy-credit, rent-with-option-to-buy plans that end up costing about twice the price of comparable sets sold in department stores.

For example, a 25-inch Magnavox color cabinet model is priced at $700 at Younkers, and was marked down recently to $600 for a sale. The price of a similar set, purchased over 18 months from a local rental agency, is $75 a month — $1,350 during the life of the contract.

The rental plans are aimed at poor people, or those who don't have enough credit history to obtain a loan to buy a television outright. While some critics call the rental plans "easy-credit rip-offs" that take advantage of the poor, those who provide the sets insist they offer a valuable service to people who otherwise could not afford a television.

Kathryn Graf, Iowa assistant attorney general in the consumer protection division, recently saw a couple who paid $39.95 a month for 13 months — about $520 — to rent a set they hoped to buy. The set turned out to be six years old.

"Economically, renting is not the best way to go," she said. "You could probably buy a set like (the one the couple was renting) for $100, if you shopped the want ads."

The attorney general's office has not had "any significant volume" of complaints about rental agencies, said Assistant Attorney General Douglas Carlson.

There always have been companies that rent appliances with options to buy in Des Moines, said Carlson, but he thinks that recently such companies are meeting with more success.

"The economic situation and tight credit has made this business a little more lucrative," he said.

Renting appliances is attractive to people who can't get credit or who don't want to list a lot of debt on financial statements. They may be applying for large loans, such as home mortgages, and want to present a debt-free credit picture.

A disproportionate number of customers at stores such as Colortyme Rentals, 1554 E. Euclid Ave., are poor. But the managers of such stores say they see nothing unethical about the fact that poor people, because they may not have good credit, are paying much higher prices than citizens who have cash or good credit ratings.

"So what's wrong with that?" countered Colortyme manager Scott Dimitt, agreeing that he seeks to serve the poor segment of the population. "There are a lot of people who can't go out and buy with cash."

At Colortyme, a Rutherford color television-stereo console rents for $25 a week or $95 a month — for a cost of $1,710 over 18 months. The suggested retail price for a similar set made by Philco is $1,295, although the Philco distributer said dealers rarely charge that much for the sets.

Dimitt's comment was repeated, with variations, by other rental Color —

Please turn to Page Two

Color —

Continued from Page One

company employees. Lee Fleischhacker, manager of the Curtis Mathes store at 1301 E. Euclid Ave., said he serves people who "credit companies aren't going to touch." Even if his customers could obtain consumer loans, they probably would pay as much as 36 percent interest, he said.

At Curtis Mathes, the top-of-the-line entertainment television-stereo console rents for $34.73 a week or $92.79 a month — that's $2,224.80 over the 24 months of the rental agreement. A comparable set, said Fleischhacker, would sell for about $1,700, although entertainment centers range from $1,500 to $2,900.

Sixty percent of the customers at Right and Sound Rent-A-Center, 2211 Rickman Road, "get ADC (Aid to Dependent Children) payments or Social Security checks or some sort of welfare ... and we know that," said employee Dean Corder.

The Rutherford or Philco television-stereo consoles at Rent-A-Center rent for $21.95 a week or $74.95 a month — over 18 months, a customer would pay $1,349.10. The Philco set list price is $1,295.

In a typical transaction, a customer calls or visits the rental store. He or she is asked to provide information that may include the name of the customer's landlord, employer, former employers, supervisor, weekly income, any housemates and their incomes, and names and addresses of friends and relatives.

This information is verified with phone calls and, in many cases, the customer has the rental television (or stereo, freezer or refrigerator) at home within an hour of contacting the store. The merchandise is carried into the home as soon as the customer signs a rental agreement.

If the companies are quick to deliver, they are also quick to react if a payment is more than a day overdue. Rental is either by the month or the week, with monthly rates slightly lower than the total of four weekly fees.

Three days after an unpaid bill is due, company representatives are on the telephone asking for payment. By the seventh day, they're at the door asking either for money or for the rental property.

Lucille Williams, 913 Day St., got so frustrated with "the hassles" of renting a television from Rent-A-Center that she returned the set after about four months.

When her payments were even a day late, said Williams, she was charged a $5 reinstatement fee. Sometimes, when her weekly $15.50 payment was due on a Saturday, a Rent-A-Center employee would call the house on Saturday to make sure Williams was planning to bring the money to the store.

And when the set broke down, Williams said she "had to beg 'em" to bring a substitute set as the rental agreement stated they would. She's planning to save money for a down payment on a similar set at a department store, so she can put it on lay-away and have it paid for within 90 days. She expects to pay about $800 for a set.

Ernestine Love, 826 Oakridge Drive, has been renting a set for $22 a month from Colortyme for nearly a year. She asked the total price when she began renting, but the store employee told her "they didn't figure the price that way, they go by the monthly bill."

Although she now realizes she probably could have bought a television for less than she has paid in rent, Love is looking forward to her last payment next May.

Colortyme calls her each month several days before her payment is due, said Love, "to remind" her about her bill. Once she called before the due date to say she would be a day late with the bill. She was told, she said, that a store employee would have to come and get the television.

"I don't like (repossessing)," said Rent-A-Center's Corder. "I've had ladies cry, especially if it's a refrigerator. But lots of times, that's what it takes to get a person to come in and pay."

Ownership of the television or other property does not pass to the renter until the final payment is made. Most televisions are rented on an 18-month basis, with the payments applied toward purchase. Even if the renter has made 17 payments on a television, for example, the store still owns the set.

And rental agreements from some of the stores include a clause that allows company employees to "enter and take possession" of the set.

The clause allows the owners to enter "peacefully," said Graf, not against the will of the person renting the set. Dimitt, of Colortyme, said the clause doesn't mean he could enter a house and take away a rental set.

Another clause in some of the rental agreements also is controversial, said Graf. Both the Curtis Mathes and Colortyme agreements stipulate that the television "is not represented to be new or unused."

Representatives at both stores said they could provide a new set if the customer asked for one. However, Graf said they would not be obligated to provide a new set even if they told the customer they would do so.

Colortyme's rental agreement also stipulates that statements or agreements made by store employees are not binding unless they are written into the contract.

Dimitt said he will hold a repossessed set for 30 days, and give the renter credit for past payments if the renter makes up a missed payment during that time. However, this stipulation is not in the written agreement.

Although the merchants agreed that most of their customers begin renting with the intention to buy a television, often they can't keep up with the payments and return the set. Their accumulated payments are lost.

"Returns happen quite frequently," said Dimitt. "There are a lot of good people who have rented from us (who couldn't make the payments). Fortunately, the contract isn't a long-term obligation."

"Most of (our customers) can't budget their money very well," said Corder of Rent-A-Center. "But most of them that keep a set for the first six months, they're going to keep it the whole time."

Carlson of the attorney general's office predicts that rentals of televisions and other appliances will continue to increase as long as the economy remains in the doldrums.

And the Wall Street Journal recently reported that television rentals were increasing in the United States. Some people rent, noted the newspaper, because they can't get credit. But others rent because they like to have the latest models in their homes.

Carlson said others rent because they are planning to move shortly and don't want the expense of moving a large television.

All the local merchants agreed their customers could buy a new television for a fraction of the rental cost. But that would mean doing without a set for a while.

"A television, especially if you can't afford to take the kids out for a movie, can really become an entertainment center for people," said Carlson. "That's why this merchandise is always in demand, even if people are really strapped."

"A lot of people can't get credit right now," said Fleischhacker. "This is something they can enjoy and end up owning. It's real hard to live without a T.V.."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ANTHONY J. TOUBCHNER
Legal Aid Society of Polk County
102 East Grand Avenue
Des Moines, Iowa 50309
(515) 243-3306
Attorney for Respondent
and Counsel of Record

1/

Now comes the Respondent, William Clark, and moves this Honorable Court for leave to proceed in forma pauperis, pursuant to Rule 46, for the reason that he is financially unable to pay the costs of this proceeding or to pay the printing costs of documents to be filed, as shown by his accompanying Affidavit, and that he believes the judgment of the United States Court of Appeals for the Eighth Circuit is free of error and need not be reviewed. Leave to so proceed was granted in both Courts below.

Anthony Touschner

ANTHONY J. TOUSCHNER
Attorney for Respondent,
William Clark
102 East Grand Avenue
Des Moines, Iowa 50309
(515) 243-3306

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 1983, a copy of the foregoing Motion of Respondent for Leave to Proceed in Forma Pauperis was sent by first class mail, postage prepaid to:

J. Samuel Choate, Jr.
Attorney at Law
505 First National Bank Building
801 Broad Street
Augusta, Georgia 30903

Anthony Touschner

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No. 82-998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE RENT-IT CORPORATION,
Petitioner,

v.

WILLIAM CLARK,
Respondent.

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF IOWA)
ss.
COUNTY OF POLK)

I, William Clark, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that the Judgment of the lower court is free from error, and not in need of review.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending the judgment below are true.

1) I am presently unemployed. I was laid off from my job as a truck driver on November 11, 1982 at Des Moines Asphalt Co. My wife and I have no present income. I received $407.20 gross pay per week at that job.

2) I received no other income from any other source in the past twelve months, except unemployment pay.

3) I have no cash, nor checking or savings account.

4) I own no real estate, stocks, bonds, nor notes. I own a 1970 Ford station wagon valued at $400.00. I own a 1979 Colby, outdoor, 16 ft. motor boat valued at $700.00.

5) The following persons are dependent upon me fo. their support:

Vickie Clark - wife

Kevin Hendricks - stepson (age 11)

Jay Clark -son (age 16)

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

William M Clark
WILLIAM CLARK

SUBSCRIBED and SWORN to before me this 22 day of January, 1983.

Betty J. Queen
NOTARY PUBLIC in and for the State of Iowa

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE